

A Reassessment of Mandatory State Bar Membership in Light of *Levine v. Heffernan*

Peter A. Martin

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Peter A. Martin, *A Reassessment of Mandatory State Bar Membership in Light of Levine v. Heffernan*, 73 Marq. L. Rev. 144 (1989).
Available at: <http://scholarship.law.marquette.edu/mulr/vol73/iss1/6>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

A REASSESSMENT OF MANDATORY STATE BAR MEMBERSHIP IN LIGHT OF *LEVINE V.* *HEFFERNAN*

I. INTRODUCTION

Legal and political divisiveness has been the hallmark of the integrated bar¹ since its initial appearance over a half-century ago.² Integrated bar states³ have frequently encountered opposing viewpoints from lawyers who have objected to the constitutionality of compulsory membership in an association. In no place has this debate been more vigorous than in Wisconsin. In fact, shortly after Wisconsin established its own integrated bar,⁴ furor by attorneys over compelled financial support of the bar resulted in a lawsuit which challenged its constitutional validity. In *Lathrop v. Donohue*,⁵ the United States Supreme Court held in a plurality opinion,⁶ that

1. The phrase "integrated bar" has been used synonymously with terms such as "unified bar," "mandatory bar," or simply "state bar." Two characteristics are germane to every integrated bar association: First, dues-paying membership is a precondition to practicing law in a state that has such a bar; and second, the bar is created by court rule or by legislation. See D. MCKEAN, *THE INTEGRATED BAR* 22 (1963); Comment, *The Integrated Bar Association*, 30 *FORDHAM L. REV.* 477 (1962).

2. The first integrated bar association was established in North Dakota by legislative enactment in 1921. For a complete list of other states with integrated bar associations, see *infra* note 3.

3. The following states have integrated bar associations: Alabama (integrated in 1923), Alaska (1955), Arizona (1933), California (1927), Florida (1949), Georgia (1963), Idaho (1923), Kentucky (1934), Louisiana (1940), Michigan (1935), Mississippi (1932), Missouri (1944), Nebraska (1937), Nevada (1929), New Hampshire (1968), New Mexico (1925), North Carolina (1933), North Dakota (1921), Oklahoma (1939), Oregon (1935), South Carolina (1967), South Dakota (1931), Texas (1939), Utah (1931), Virginia (1938), Washington (1933), West Virginia (1945), Wisconsin (1956) and Wyoming (1939). The District of Columbia was integrated in 1972. The territory of Puerto Rico was integrated in 1932 and the Virgin Islands were integrated in 1956. Nineteen states have no integrated bar: Arkansas, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee and Vermont. See PARNES, *CITATIONS AND BIBLIOGRAPHY ON THE UNIFIED BAR IN THE UNITED STATES* 3-4 (1973). Montana was integrated in 1974. See Application of the President of the Montana Bar Association, 163 *Mont.* 523, 518 P.2d 32 (1974). Rhode Island was integrated in 1973. See Petition of the Rhode Island Bar Ass'n, 111 *R.I.* 936, 306 A.2d 199 (1973).

The trend of unification is evidenced by the number of jurisdictions which unified each decade: six jurisdictions unified in the 1920s, fifteen in the 1930s, three in the 1950s, three in the 1960s, and three in the 1970s. *Id.*

4. In 1956, the Wisconsin Supreme Court unified the bar on an experimental basis. See *Integration of the Bar*, 273 *Wis.* vii, 79 N.W.2d 441 (1956); *In re Integration of the Bar*, 273 *Wis.* 281, 77 N.W.2d 602 (1956). In 1958, the Court extended its 1956 unification order indefinitely. See *In re Integration of the Bar*, 5 *Wis.* 2d 618, 93 N.W.2d 601 (1958).

5. 10 *Wis.* 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961).

6. 367 U.S. 820 (1961) (Brennan, J., majority opinion). Concurring opinions were submitted by Justice Harlan and Justice Whittaker. Justice Douglas and Justice Black dissented.

Wisconsin's mandatory bar membership requirement did not violate the plaintiff's first amendment right not to associate with the state bar.⁷ Supporters of the integrated bar movement hoped that the Court's pronouncement in *Lathrop* would silence critics once and for all. However, opposition to the integrated bar in Wisconsin and in other states has persisted.⁸

In 1988, lawyers opposing the integrated bar won an important victory when a United States District Court declared Wisconsin's mandatory bar membership requirement unconstitutional in *Levine v. Supreme Court of Wisconsin*.⁹ The district court ruled that *Lathrop* was no longer determinative in assessing the constitutional propriety of Wisconsin's mandatory bar for two reasons.

First, in subsequent Supreme Court decisions in which freedom of association was an issue, the Court typically required that the state demonstrate a compelling interest in abridging the rights of its citizens, rather than the lesser requirement of a legitimate state interest analysis applied in *Lathrop*.¹⁰ Second, because the character of the Wisconsin bar had changed significantly since *Lathrop*, that case was factually distinguishable from the current controversy.¹¹ Concluding that *Lathrop* was no longer dispositive on the issues, the district court applied a compelling state interest analysis to the first amendment infringement and determined that compulsory bar membership was unconstitutional.¹²

On appeal to the United States Court of Appeals for the Seventh Circuit, the court reversed the district court decision, concluding that *Lathrop* remained the controlling authority on the issue of integrated bar associations.¹³ Nevertheless, the court concurred with the district court that the State Bar of Wisconsin had changed significantly since *Lathrop*.¹⁴ Moreover, the court of appeals stated that "[i]f Wisconsin's present integrated bar is substantially similar to its predecessor, *Lathrop* compels us to conclude that it serves a legitimate state interest."¹⁵ Unfortunately, the court of appeals never made an adequate comparison of the past and present bar

7. *Id.* at 843.

8. See *infra* note 119 for a list of cases raising compulsory bar membership issues.

9. 679 F. Supp. 1478 (W.D. Wis. 1988) (Crabb, C.J.), *rev'd sub nom.* *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989).

10. 679 F. Supp. at 1493-94.

11. *Id.* at 1494.

12. *Id.* at 1502.

13. 864 F.2d 457 (7th Cir. 1988) (Flaum, J.).

14. *Id.* at 458 ("Since *Lathrop* was decided, the character of the Wisconsin bar has changed considerably.").

15. *Id.* at 462.

associations. Consequently, some doubt remains concerning whether *Lathrop* is indeed factually distinguishable from the *Levine* decision.

This Comment will first address the history of the integrated bar and the underlying policy concerns which culminated in its nationwide implementation. Special attention will be given to the integrated bar's evolution in Wisconsin, including a discussion of events before and after the *Lathrop* decision. Part Three of the Comment will explore the constitutional implications raised by compulsory membership in an association. Part Four provides a discussion of the issues raised by the district court in *Levine* as well as a critique of the court of appeals decision. Finally, this Comment will conclude with an assessment of the efficacy of the integrated bar and a recommendation that states opt for voluntary bar status.

II. BACKGROUND

A. History of the Integrated Bar

The national movement for unification of bar associations began in 1914. The principal advocate of the movement was Herbert Harley, founder and executive secretary of the American Judicature Society.¹⁶ Harley believed that voluntary bars were "entirely inadequate to the needs of the lawyer from either the standpoint of self-interest or from the standpoint of public service."¹⁷ He asserted that bar associations should promote "social intercourse," political involvement in "statecraft," and the "need for education of the bar, for its proper discipline, and for the conduct of its business."¹⁸ Harley deemed that the best means to achieve those purposes was to "[weld] all the lawyers of a state into one closely knit organization."¹⁹ In retrospect, Harley had good reasons to argue for bar integration.

First, the membership rate in state bar associations of the nineteenth and early twentieth century was low. For example, as compared to the medical societies of twenty-five states in the late 1920s, which had more than two-thirds of their state's doctors as members, membership in volun-

16. The integrated bar movement in the United States was considered to have commenced in 1914 when Harley delivered a speech to the Lancaster County Bar Association in Lincoln, Nebraska on December 28, 1914. See D. MCKEAN, *supra* note 1, at 30-37. For the complete text of Harley's speech, see Harley, *A Lawyer's Trust*, 29 JUDICATURE 50 (1945); Sorenson, *The Integrated Bar and the Freedom of Nonassociation — Continuing Seige*, 63 NEB. L. REV. 30, 34 (1984); Comment, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis*, 66 NEB. L. REV. 762, 767 (1987).

17. Harley, *supra* note 16, at 51.

18. *Id.* at 51-52.

19. *Id.* at 56.

tary bar states during the 1920s included only ten percent to thirty percent of the practicing lawyers.²⁰ Such low membership was inexplicable considering that most bar associations were not selective with respect to whom they admitted.²¹ However, since Harley's time, membership in voluntary bar states has improved tremendously.²²

Second, early state bars had a difficult time maintaining membership stability. Sudden fluctuations in the rank and file resulted in disintegration or reorganization of many associations.²³ Although unpredictable loss in membership is still a problem today, fluctuations are usually small. Typically, losses in membership tend to be a manifestation of a protest against a bar program or decision. Although integrated bars are able to avoid the membership instability that voluntary bars sometimes experience, they are by no means insulated from other sources of instability.²⁴

Third, without members, bar associations were also deprived of their greatest source of revenue. Absent modern sources of income, such as advertising, membership dues were the only source of income available for state bars to use. Consequently, dues revenues in the statewide associations of the early twentieth century were insufficient to sustain their programmatic needs.²⁵ However, when voluntary bars began to integrate, revenues

20. See Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 8.

21. *Id.* One explanation was that lawyers failed to join because activities concerning the administration of justice were not the subject of bar meetings; rather, they were viewed as social clubs. *Id.* According to Harley, the bar was too fragmented from differences in the lawyer's work; the trend toward specialization was antithetical to lawyer solidarity. *Id.* at 9. Professor Schneyer has criticized this argument for two reasons. First, the medical profession was more fragmented and specialized and yet retained two-thirds of its members. Second, membership in the voluntary bar has improved over the years. *Id.* at 9-10.

22. *Id.* at 10. As of February 28, 1989, membership in the voluntary bars in the following Midwest states averaged approximately 85%: Illinois (82% - phone conference with Janet Paul of the Illinois State Bar); Iowa (89% - phone conference with Craig Gaare of the Iowa State Bar); Indiana (83% - conversation with Donna Lucas of the Indiana State Bar); Wisconsin (87% - phone conference with Julie Chrisler of the State Bar of Wisconsin).

23. See R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 271-72 (1953); Schneyer, *supra* note 20, at 12.

24. Professor Schneyer has suggested that where the exit from an association is foreclosed, members will be more likely to be vocal and obstructive to policies which they personally find objectionable. See Schneyer, *supra* note 20, at 13. Schneyer cites Wisconsin's attempt to assess members a fee for an advertising campaign. Dissident members petitioned the state supreme court, which subsequently prohibited the bar from the levying of the assessment. *Id.* (citing *In re Petition to Review Change in State Bar Dues*, 86 Wis. 2d xv (1978)).

25. See Schneyer, *supra* note 20, at 13-14. Modern bar associations gain revenue through selling advertising in their state bar journals, seminar registration fees, admission fees for conventions, and investments. For a list of revenue sources for the Wisconsin State Bar, see State Bar of Wisconsin, *A Year of Introspection*, 61 WIS. B. BULL. 33, 35 (Nov. 1988).

increased significantly.²⁶ Despite this fact, it is debatable whether integration has made it easier for state bars to collect revenue. One mistaken belief about revenue generation is that some lawyers in integrated bars would be more content to pay higher dues if they knew that all other lawyers would be making a similar sacrifice. In reality, integration gives a voice to the portion of a state's lawyers who do not want to be dues-paying members. As a result, proposals for increases in dues have been met with great resistance.²⁷ Similar problems are not readily apparent in voluntary bar states. In fact, dues in voluntary bar states tend to be higher than in integrated bar states.²⁸

B. *The Purposes of Integration*

Not only was integration touted as the solution to membership and revenues problems common in the voluntary bar, the integrated bar was promoted as a means of allowing lawyers to speak with one voice on legislative issues and also "weed the profession of its unworthy members."²⁹ However, more recent events have suggested the integrated bar's ineffectiveness in meeting the goals for which it was originally established.

26. For example, in 1929 the integrated North Dakota bar raised more money than the demographically similar, but yet to be integrated, South Dakota bar. North Dakota also spent four times as much on discipline. See Am. Judicature Soc'y, *Cost of Running State Bar*, 13 J. AM. JUDICATURE SOC'Y 185 (1930).

27. In 1976, the State Bar of Wisconsin petitioned the supreme court to increase the maximum dues amount from \$40 to \$100. However, the supreme court merely increased dues to \$60 due to strong opposition by the membership and appointed a committee to study the bar activities and governance. The following year, the bar renewed its request for the \$100 dues amount but the court refused, although it did authorize a separate \$30 assessment to support newly created regulatory agencies. See *In re Regulation of the Bar*, 81 Wis. 2d xxxv (1977). In 1980, the District of Columbia Bar Board of Governors proposed an increase in the dues ceiling from \$50 to \$150. After a large segment of the bar vigorously protested, a subsequent referendum of the members recommended a ceiling increase of not greater than \$75. See *Petition to Amend Rule 1 of the Rules Governing the Bar*, 431 A.2d 521, 525-26 (D.C. 1981); see also *In re Amendment to Integration Rule, Article VIII, Subsection 1 (Dues)*, 416 So. 2d 1124 (Fla. 1982) (refusal by the court to further raise the dues ceiling for future years); *Douglas v. State Bar*, 183 Mont. 155, 598 P.2d 1080 (1979) (court reinstates its own authority to approve or disapprove future dues increases).

28. In 1987, Wisconsin's annual dues were \$115. In neighboring Illinois, dues were \$160, in Iowa \$150, and in Minnesota \$115. Only in Indiana were dues lower (\$95). See ABA, *BAR ACTIVITIES INVENTORY* Tab C (1987).

29. See Schneyer, *supra* note 20, at 15 (quoting 1 REP. ST. B. ASS'N. WIS. 5, 6, 9 (1878) (address of Chief Justice Ryan)).

1. Law Reform

The voluntary bar was criticized as an association that had little influence in the legislative arena.³⁰ This resulted in many integrated bar advocates promoting "improv[ement] [in] the administration of justice" as a formal purpose of the integrated bar.³¹ One of the primary justifications for the integrated bar's involvement in the lawmaking process was that its work advanced the public interest because it limited itself to subjects involving purely technical expertise.³² However, the parameters in which a state bar could engage in such activity allowed it to go beyond merely technical legal issues. For example, the Wisconsin Supreme Court has permitted the State Bar of Wisconsin ("State Bar" or "Bar") to take positions on legislation only in areas pertaining to the "administration of justice, court reform, and legal practice."³³ Admittedly, while some activities were indeed technical, the Wisconsin State Bar assumed an active role in other areas which were highly political and yet pertained to the administration of justice.³⁴ Nevertheless, despite the latitude the State Bar has on administration of justice issues, further court restrictions on legislative position-taking may not be possible.³⁵

30. "It is . . . common knowledge that any bill proposed by the Association has usually met defeat." See Schneyer, *supra* note 20, at 25 (quoting Hudnall, *Address of George B. Hudnall, President State Bar Association of Wisconsin*, 12 REP. ST. B. ASS'N. WIS. 77, 78 (1916)). But see Vanderbilt, *Past, Present and Future of the Legal Profession*, 20 J. AM. JUDICATURE SOC'Y 208, 209 (1937) (A unified bar has "standing with the bench, the chief executive, the legislature and the public generally that it has nowhere else attained.").

31. See E. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* 6 (1954).

32. See Harley, *Organizing the Bar for Public Service*, 8 J. AM. JUDICATURE SOC'Y 72, 79 (1924); Schneyer, *supra* note 20, at 30.

33. *Lathrop v. Donohue*, 10 Wis. 2d 230, 239, 102 N.W.2d 404, 409 (1960), *aff'd*, 367 U.S. 820 (1961).

34. Professor Schneyer highlights the position the State Bar took with regard to no-fault automobile insurance. Schneyer characterized it as a "foray into plain old politics." See Schneyer, *supra* note 20, at 32. Another sensitive topic which has created problems elsewhere is the Wisconsin bar's involvement in tort reform. During 1987-88 for example, the Bar's committee on tort law recommended opposition to several tort reform proposals introduced to the Wisconsin legislature, while drafting its own proposals. See State Bar of Wisconsin, *A Year of Introspection*, 61 WIS. B. BULL. 20, 30 (Nov. 1988). Bar involvement in tort reform was the subject of a court challenge in New Hampshire. See *In re Chapman*, 128 N.H. 24, 509 A.2d 753 (1986); see also *Hollar v. Government of the Virgin Islands*, 857 F.2d 163, 170 (3rd Cir. 1988) (endorsement of the candidacy of a potential United States attorney); *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478, 1483 (W.D. Wis. 1988), *rev'd sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989) (among other items, a resolution voted upon and passed by the board of governors opposing apartheid in South Africa).

35. Professor Schneyer argues that further limitations may not be possible in light of two policy considerations:

2. Raising Professional Standards

The most important goal of the integrated bar concerned the upgrade of admission standards and discipline.³⁶ As law practice became more concentrated in cities and more specialized,³⁷ lawyers had to rely less on their personal reputations and more on marketing their expertise to unknown persons;³⁸ consequently, "policing institutions which could establish the bar's general trustworthiness became more valuable."³⁹

Although most lawyers felt that more rigorous admission standards would increase client confidence, the greatest criticisms were aimed at the primitive attorney discipline process.⁴⁰ Courts were willing to disbar lawyers for egregious behavior but were unwilling to impose sanctions for minor offenses. Some local bar associations did retain grievance committees, but the influence of the committees was minimal due to a lack of legitimacy, funding and subpoena power.⁴¹ Integrating the state bar was considered the most effective method of curtailing these problems since an integrated state bar would have adequate funding for investigatory and disciplinary proceedings. Moreover, in its official capacity, the integrated bar would be capable of establishing binding ethics rules, disciplinary sanctions, and an infrastructure for adjudicating grievances.⁴²

First, even under the state bar's rather broad authority, there has been more hand-wringing and dissension over "jurisdictional" issues than one finds in voluntary bar associations. If new restrictions were tighter but no more precise than the present ones, still more time and energy would be consumed in jurisdictional squabbles. Yet the line between technical law reform and other legislative subjects seems too elusive to permit more precise guidelines

Second, the state bar has considered itself to be prohibited from addressing some fundamental questions concerning our legal and constitutional order. If such questions are inappropriate for a state bar, they are nonetheless questions that lawyers, like other citizens, are entitled under the First Amendment to address collectively. Tighter subject-matter limits would widen the gap between what the state bar may address and what lawyers are entitled to address collectively.

Schneyer, *supra* note 20, at 33-34 (footnote omitted).

36. See R. POUND, *supra* note 23, at 253-69.

37. J.W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 297-301 (1950).

38. M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 6 (1977).

39. See Schneyer, *supra* note 20, at 16.

40. See Schneyer, *supra* note 20, at 16-17. Wisconsin Bar President Claire Bird was sharply critical of the lack of binding rules to govern the practice of law and the deficient lawyer discipline machinery. See Bird, *This Association: What Can It Be and Do?*, 10 REP. ST. B. ASS'N WIS. 193, 194 (1914).

41. See Schneyer, *supra* note 20, at 17 (citing Bird, *This Association: What Can It Be and Do?*, 10 REP. ST. B. ASS'N WIS. 193, 201 (1914)).

42. *Id.* at 17-18 (citing Bird, *This Association: What Can It Be and Do?*, 10 REP. ST. B. ASS'N WIS. 193, 203 (1914)).

The integrated bar brought some improvement in policing the profession, but not to the degree the early visionaries had foreseen. Most state bars "were never given a significant role in defining admission standards, preparing and grading bar examinations, or performing character investigations."⁴³ In discipline, the promulgation of ethics rules was undertaken by the state supreme courts, which adopted the American Bar Association standards instead of logically designed rules.⁴⁴ In disciplinary enforcement, courts were reluctant to be bound by state bar fact-finding and often exercised their own judgment when enforcing punishment for misconduct.⁴⁵ Additionally, courts and legislatures also began to exercise their rulemaking authority to create separate agencies for administering and controlling the disciplinary machinery.⁴⁶

3. The Intrinsic Value of Membership in an Integrated Association

In addition to the integrated bar's potential effectiveness in law reform and discipline, proponents viewed integration itself as having a positive effect on the membership; "that when lawyers are brought into an association . . . they gain an 'enlarged concept of [their] place in our social and economic pattern.'"⁴⁷ Still a more popular belief was that a lawyer was "less likely to play his proper role when he 'remains isolated without anything to make him conscious of his relation to the bar as a whole, [and] without . . . contact with its great traditions.'"⁴⁸ From a behavioral standpoint, the natural tendency of lawyers was to subordinate their greater social responsibilities to their personal goals and ambitions. Acting as an overriding and guiding force, the integrated bar would direct the lawyer's awareness to more serious socioeconomic concerns.⁴⁹ Of course, this argument was premised on the participation of lawyers in bar administration and related activities. However, participation in the integrated bar is completely op-

43. Schneyer, *supra* note 20, at 19; see also G. BRAND, *BAR ASSOCIATIONS, ATTORNEYS AND JUDGES: ORGANIZATION, ETHICS, DISCIPLINE* 1037-71 (1956).

44. See Schneyer, *supra* note 20, at 19.

45. See Turrentine, *May the Bar Set Its Own House in Order?*, 34 MICH. L. REV. 200, 202 (1935).

46. In 1987, only 22 of the 33 state bars employed a full-time staff lawyer to receive, investigate, and/or prosecute attorney discipline matters. See ABA, *BAR ACTIVITIES INVENTORY*, *supra* note 28, at Tab I. This is down slightly from 1980, in which 24 states had similar involvement. See ABA, *DIRECTORY OF BAR ACTIVITIES* 21 (1980). As of 1980, the courts of 19 jurisdictions have assumed centralized control over all attorney discipline. *Id.*

47. See Schneyer, *supra* note 20, at 38 (quoting Petition of Fla. State Bar Ass'n, 40 So. 2d 902, 908 (Fla. 1949)).

48. *Id.* (quoting REPORT OF THE COMM. ON STATE BAR ORGANIZATION, ABA Conference of Bar Delegates (St. Louis, Aug. 24, 1920)).

49. *Id.* at 39.

tional. Consequently, the likelihood of "socializing" a lawyer is the same in both voluntary and mandatory bar associations.⁵⁰

C. The Wisconsin Tradition

In any discussion of the unification debate, special focus on the evolution of Wisconsin's integrated bar seems justified not only because of the *Lathrop*⁵¹ and *Levine*⁵² decisions, but also because the integrated bar debate has existed longer in Wisconsin than in other states.

The first proposal for integration was made in 1914 by Wisconsin State Bar President, Claire Bird.⁵³ Although this proposal did not bring about any immediate changes in the infrastructure of the State Bar, it was the catalyst which sparked further discussion during the 1920s and an unsuccessful legislative campaign in the 1930s.⁵⁴

Finally, in 1943, the Wisconsin legislature enacted a statute which created a state bar and called upon the state supreme court to "provide for the organization and government of the association."⁵⁵ Although the court acknowledged the validity of the statute, it postponed its implementation until after the war.⁵⁶ In 1946, when the State Bar President petitioned the court to commence integration, the court unexpectedly denied the petition.⁵⁷

The 1946 integration opinion is significant because of its "unprecedented focus on the tension between state bar accountability and autonomy, and for the way this focus affected the court's evaluation of the unified bar."⁵⁸ Essentially, the court believed that state bar dues should be treated

50. *Id.* Professor Schneyer suggests that mandatory state bars have no advantage over voluntary bars in encouraging participation. In committee involvement, he saw no difference between mandatory state bar participation and voluntary bar participation. *Id.* at 39-40. Schneyer also noted that a lawyer could participate in the bar by expressing his opinion in, or being influenced by, the state bar journal. Yet, he saw this mode as ineffective and characterized the Wisconsin Bar Bulletin as "predictable, shallow and one-sided" in issues pertaining to the economics of law practice. *Id.* at 42. Consequently, "whether one looks at active participation by lawyers in state bar affairs or at what lawyers read in state bar journals, one finds scant support for the traditional claim that bringing all lawyers together in an official statewide association expands professional consciousness and thereby benefits society." *Id.* at 43.

51. *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961).

52. *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis. 1988), *rev'd sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989).

53. See Bird, *supra* note 40, at 194.

54. See Schneyer, *supra* note 20, at 5 n.27.

55. 1943 WIS. LAWS 497.

56. See *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943).

57. *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946).

58. See Schneyer, *supra* note 20, at 48.

as public funds.⁵⁹ Therefore, close judicial scrutiny of the state bar's activities and expenditures would be required.⁶⁰ Believing the State Bar to be a public agency, the court accordingly rejected the petition for integration because "[t]he bar ought to have the untrammelled power of acting in unison . . . without any feeling that its activities are subject to control or censorship."⁶¹ Judicial supervision would effectively nullify the perception that an integrated bar was a self-governing body.⁶² Further, integration would saddle the court with the burden of "scrutinizing every activity for which it is proposed to expend funds derived from dues."⁶³ Despite this ruling, the court eventually reversed itself and established an integrated state bar.⁶⁴

1. The *Lathrop* Decision

In 1960, a Madison lawyer, Trayton Lathrop challenged the Wisconsin Supreme Court's ruling. Lathrop sued to recover his bar dues, arguing that in light of the State Bar's legislative lobbying activity, compelling him to be a member of the State Bar and pay dues in order to practice law in Wisconsin abridged his first amendment rights of association and speech.⁶⁵ In a unanimous decision, the state supreme court rejected his claim.⁶⁶ In so ruling, the court held that the integrated bar did not "compel the plaintiff to associate with anyone. He is free to attend or not to attend its meetings or vote in its elections as he chooses."⁶⁷ Additionally, the court acknowledged that although the use of mandatory dues to advocate positions in which Lathrop disagreed posed a genuine first amendment concern, the "slight inconvenience" to Lathrop was "far outweigh[ed]" by the state's interest in improving the administration of justice.⁶⁸ Although some commentary has

59. *In re Integration of the Bar*, 249 Wis. at 528, 25 N.W.2d at 502. "No matter what these fees be called, they are moneys [sic] required to be paid into the treasury of the bar for a public purpose connected with the administration of justice." *Id.*

60. *Id.* "[T]his court must assume the responsibility of seeing that activities of the bar for which these moneys [sic] are paid are sufficiently public to warrant the use of the money for their promotion." *Id.*

61. *Id.* at 530, 25 N.W.2d at 503.

62. *Id.* at 528, 25 N.W.2d at 502.

63. *Id.* at 529-30, 25 N.W.2d at 503.

64. The Wisconsin Supreme Court unified the bar in 1956 on an experimental basis and made these preliminary provisions permanent in 1958. See *supra* note 4.

65. *Lathrop*, 10 Wis. 2d at 230, 102 N.W.2d at 404.

66. *Id.* at 245, 102 N.W.2d at 412.

67. *Id.* at 237, 102 N.W.2d at 408.

68. *Id.* at 242, 102 N.W.2d at 411. The court compared a lawyer's financial support of state bar activities to the general taxpayer's compelled support of the Wisconsin Judicial Council. The court said that both the bar and the Judicial Council were created by state action to serve a public purpose and that a "taxpayer could not successfully challenge the constitutionality of the disbursement of public funds derived from taxes to support the activities of the judicial council

been critical of the supreme court's reasoning in *Lathrop*,⁶⁹ the court's decision exonerated the State Bar from the allegations of constitutional infringement and validated the use of mandatory dues to support positions which furthered the administration of justice.

2. Supreme Court Review

It was thought that the Wisconsin Supreme Court's decision would quash further court challenges to State Bar activity. However, "all bets were off"⁷⁰ when the United States Supreme Court affirmed *Lathrop* in a plurality decision which left the State Bar's right "to use . . . the dues of dissident members . . . in a state of 'disquieting Constitutional uncertainty.'" ⁷¹ Moreover, the view of several justices concerning the State Bar's ability to take positions on legislative issues raised further concerns which relate to the constitutional propriety of the integrated bar.

In the first of the *Lathrop* opinions, Justice Brennan⁷² held that mandatory membership in the Wisconsin State Bar was constitutional,⁷³ but declined to address whether *Lathrop* could be compelled to contribute to political causes which he opposed.⁷⁴ The unresolved dues issue left the State Bar to speculate as to how mandatory dues should be allocated to legislative activity. However, Brennan's opinion may have had deeper significance. In response to *Lathrop*'s argument "that because of its legislative

merely because he was opposed to certain proposed legislation which it recommended . . ." *Id.* at 243, 102 N.W.2d at 411.

69. Professor Schneyer criticized the decision on two counts. First, he felt that the court trivialized many of the reasons for protecting the right of non-association, including the expression of disagreement by quitting and the desire not to associate one's self — even passively — with a group's position. *See Schneyer, supra* note 20, at 51. Second, the court's use of the taxpayer analogy was not accurate since the Wisconsin Judicial Council was not a membership organization and did not represent a particular constituency. *Id.* One of the purposes of the Wisconsin State Bar is to "safeguard the proper professional interests of the members of the bar." *See SCR 10.02(2)* (1988). Schneyer also was critical of the first amendment scrutiny employed by the court, which he characterized as "hardly . . . demanding" and noted that a stricter review may have focused the court more precisely on the Bar's effectiveness in law reform. *See Schneyer, supra* note 20, at 53 n.298.

70. *See Schneyer, supra* note 20, at 53.

71. *Id.* (citing *Lathrop*, 367 U.S. at 848 (Harlan, J., concurring)).

72. Justice Brennan wrote for the plurality. Joining him were Chief Justice Warren, Justice Clark and Justice Stewart. *Lathrop*, 367 U.S. at 821.

73. *Id.* at 843. "Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." *Id.*

74. *Id.* at 847-48. Because *Lathrop* did not specify those bar positions to which he objected, the Court reserved for another day the question of compelled financial support for activities to which a member objects. *Id.*

activities, the State Bar partakes of the character of a political party,"⁷⁵ Justice Brennan repeated a policy statement set forth by the Bar, in which legislative activity would not be sponsored unless the board of governors was "satisfied that the recommendation represents the consensus and the best composite judgment of the legal profession of this state."⁷⁶ If the membership "is of a substantially divided opinion,"⁷⁷ then no action would be taken. Brennan noted that this policy was based on statements made by Alfred LaFrance.⁷⁸ LaFrance recommended that in the realm of legislative activity:

the rule of substantial unanimity should be observed. Unless the lawyers of Wisconsin are substantially for or against a proposal, the State Bar should neither support nor oppose the proposal. . . . The State Bar represents all of the lawyers of this state and in that capacity we must safeguard the interests of all.⁷⁹

Presumably, Justice Brennan applied this rationale to portray the Wisconsin State Bar's legislative advocacy in terms more closely akin to advocacy in which a voluntary bar would engage, with the clear presumption that the payment of dues in a voluntary association is indicative of the member's consent to the activity.⁸⁰ Obviously, to have every lawyer consent to an activity in an integrated bar, the rule of substantial unanimity must mean complete unanimity. From this viewpoint, Brennan's argument fails because complete unanimity is unattainable and would paralyze the Bar's ability to take positions on legislative matters.⁸¹

In a concurring opinion, Justice Harlan believed that bar integration itself was constitutional,⁸² yet he felt that Lathrop's allegation relating to compulsory financial support of certain activities posed a genuine first amendment issue which the Court should have addressed.⁸³ However, Harlan felt that Lathrop's right of freedom from such compulsory support was substantially outweighed by the state's interest in maintaining a public "commission" designed to "recommend changes in the more or less technical areas of the law."⁸⁴ To argue otherwise would have the effect of jeop-

75. *Id.* at 833.

76. *Id.* at 834 n.9.

77. *Id.*

78. LaFrance was a former president of the voluntary Wisconsin Bar Association. *Id.* at 834.

79. *Id.* (quoting A. LaFrance, *Report Respecting Proposed Procedure on Legislative Matters*, 30 Wis. B. BULL. 41, 42 (Aug. 1957)).

80. See Schneyer, *supra* note 20, at 56.

81. See Schneyer, *supra* note 20, at 56-57.

82. *Lathrop*, 367 U.S. at 864-65.

83. *Id.* at 848-49.

84. *Id.* at 864.

ardizing the use of tax revenues to support the legislative activities of organizations such as the judicial councils of each state and federal organizations like the Interstate Commerce Commission or the Judicial Conference of the United States.⁸⁵

In stark contrast to the concurring opinions upholding integration, Justice Douglas perceived integration to be invalid on its face.⁸⁶ Douglas' chief concern was over the notion of forced association itself: "The right to belong — or not to belong — is deep in the American tradition."⁸⁷ Justice Douglas also recognized the similarity between bar unification and statutes authorizing compulsory membership in unions; but distinguished the two based on the historically proven need for "collective bargaining as one of the means of preserving industrial peace."⁸⁸ Since Wisconsin could not point to any "exceptional circumstances"⁸⁹ justifying a first amendment infringement, its integration law could not survive the level of scrutiny called for in such situations.⁹⁰

3. The Wisconsin Bar After *Lathrop*

Constitutional considerations left unaddressed by the Court in *Lathrop* resurfaced several years later when the State Bar became involved in the judicial selection process. In 1963, the State Bar polled its members to determine if they felt a candidate for a federal judgeship was qualified for the job. The bar association stated at the outset that it would not publish the results unless a majority of the respondents favored disclosure. Although a majority did approve of the measure, shortly before publication, an attorney petitioned the state supreme court to prohibit its dissemination on the grounds that judicial polling was beyond the scope of the State Bar's pow-

85. *Id.* at 853.

86. *Id.* at 877-85. Justice Black also dissented, but saw no need to totally dismantle the integrated bar. He felt that the appropriate remedy was to refund that part of *Lathrop's* dues spent on programs which he opposed. *Id.* at 877.

87. *Id.* at 881-82.

88. *Id.* at 880; see *infra* notes 163-89 and accompanying text for a discussion of first amendment considerations with respect to unions.

89. *Id.* at 882 (Douglas, J., dissenting).

[T]he necessities of life put us into relations with others that may be undesirable or even abhorrent, if individual standards were to obtain. Yet if this right is to be curtailed by law, if the individual is to be compelled to associate with others in a common cause, then I would think exceptional circumstances should be shown.

Id.

90. "I would treat laws of this character like any that touch on First Amendment rights. . . . [They must] be 'narrowly drawn' so as to be confined to the precise evil within the competence of the legislature." *Id.* at 882 (citation omitted).

ers. In response, the state supreme court in *Axel v. State Bar of Wisconsin*⁹¹ held that judicial qualification polls were an important aspect of the administration of justice and thus permissible.⁹² It is interesting to note, however, that since *Axel*, the State Bar has not engaged in judicial polling.⁹³

As for the rule of substantial unanimity enunciated in *Lathrop*, the State Bar opted to abide by its policy statement which required "substantial unanimity" as a prerequisite to position taking. However, in 1977, the Wisconsin Supreme Court's first Committee to Review the State Bar⁹⁴ found that the public greatly benefited from the Bar's position taking and thus recommended that the substantial unanimity requirement be relaxed, "even though the liberty of dissenting State Bar members may be abridged as a result."⁹⁵

Important changes in the infrastructure of the Bar also occurred during the 1970s. In 1976, the Wisconsin Supreme Court created the Board of Attorneys Professional Competence and the Board of Attorneys Professional Responsibility to administer bar admission requirements and attorney discipline.⁹⁶ By this action, the State Bar was almost totally divested of "hands-on" involvement in regulating discipline and ethics, since both organizations were created and operated under the exclusive aegis of the state supreme court.⁹⁷ Financial support for these two agencies was to be derived from assessments on all lawyers separate from the mandatory dues payments.⁹⁸ Additionally, the court placed continuing legal education (CLE) into a regulatory agency under its auspices, with funding for the

91. 21 Wis. 2d 661, 124 N.W.2d 671 (1963).

92. *Id.* at 667-68, 124 N.W.2d at 675.

93. See Schneyer, *supra* note 20, at 81. As of 1987, only 15 of the 33 integrated bars conduct judicial polling. See ABA, BAR ACTIVITIES INVENTORY, *supra* note 28, at Tab P.

94. Supreme Court Rule 10.10 authorizes the Wisconsin Supreme Court to "appoint a committee to review the state bar's performance in carrying out its public functions at such time the court deems advisable." This type of authorization is more commonly known as a "sunset law." See Schneyer, *supra* note 20, at 73. The report issued by the first committee was known as the Parnell Report, named after the committee chairman Judge Andrew Parnell of Appleton, Wisconsin.

95. See Schneyer, *supra* note 20, at 82 (quoting The Parnell Report at 18). The Wisconsin Supreme Court did not address this issue when responding to the findings of the Parnell Report. See *In re Regulation of the Bar*, 81 Wis. 2d xxxv, xxxix (1977).

96. See *In re Regulation of the Bar*, 74 Wis. 2d ix (1976).

97. *Id.* at x (all members are appointed by the state supreme court).

98. See Supreme Court Rule (SCR) 10.03(5) (1988). Lawyers are also separately assessed to support the Client Security Fund, a fund designed to compensate injured clients for the misconduct of their attorneys. See SCR 12.04(1) (1988). For the sake of convenience, the state bar collects payments which support these regulatory programs at the same time it collects annual dues. See SCR 10.03(5) (1988).

program to be likewise derived from sources other than dues payments.⁹⁹ This intervention by the supreme court was motivated primarily by a concern that the State Bar was not sufficiently accountable to the public; that an organization of lawyers would be more concerned about their own interests than the interests of the public at large.¹⁰⁰ Along these lines, the court, in 1977, also made an alteration in the makeup of the bar association's board of governors, permitting three non-lawyers to sit on the board.¹⁰¹ Voting rights were extended to those members in 1980.¹⁰²

The Parnell Committee¹⁰³ was also told to study the State Bar and to make recommendations to the supreme court on the viability of continued operation as an integrated bar.¹⁰⁴ Although the committee and court determined that "the large majority of Wisconsin lawyers, support, or at least do not oppose, the unified bar,"¹⁰⁵ that determination did not prevent more than 400 lawyers from signing a petition requesting that the State Bar's board of governors submit several questions to the membership, the content of which addressed the continuance of the integrated bar.¹⁰⁶ The supreme court denied the petitioner's request based on several technical discrepancies.¹⁰⁷

99. CLE is regulated by the Board of Attorneys of Professional Competence and funded by a separate assessment on lawyers. See *Regulation of the Bar*, 81 Wis. 2d at xli. One of the regulatory functions this agency performs is accreditation of CLE providers. See SCR 31.08 (1988). Professor Schneyer has suggested that removing these regulatory programs from the bar only enhanced public confidence in its integrity. See Schneyer, *supra* note 20, at 98.

100. See Schneyer, *supra* note 20, at 72-73, 89, 98.

101. See *Regulation of the Bar*, 81 Wis. 2d at xlii.

102. See *In re Amendment of State Bar Rules*, 96 Wis. 2d xi (1980).

103. See *supra* note 94.

104. The committee was to make recommendations to the court on four questions:

(1) the concept of the integrated bar and whether it should continue in Wisconsin; (2) the type of activities in which the State Bar should engage; (3) the appropriate means of financing the activities of the State Bar, including the extent to which continuing legal education activities provide funds for other Bar activities; (4) the management of State Bar funds, including budget development, accountability for expenditures, and the development and use of surpluses.

Regulation of the Bar, 81 Wis. 2d xxxv.

105. *State ex rel. Armstrong v. Board of Governors*, 86 Wis. 2d 746, 751, 273 N.W.2d 356, 358 (1979) (quoting *Regulation of the Bar*, 81 Wis. 2d xxxvi (1977)).

106. *Id.* at 748, 273 N.W.2d at 357. The proposed referendum posed three questions; the last one read as follows: "III. Should it be the policy of the State Bar to urge the Supreme Court to take appropriate action to assist the orderly transformation of the mandatory character of the State Bar to a voluntary association?" *Id.*

107. The Wisconsin Supreme Court excluded all three questions, stating that they pertained to "court policy, not bar association policy." *Id.* at 751, 273 N.W.2d at 358. However, the court did not explain why a matter for the court to decide could not be a policy issue on the agenda of the State Bar. *Id.* at 749, 751, 273 N.W.2d at 357-58.

Twice during the 1980s, the supreme court has appointed a committee to review the question of the continued integration of the State Bar. The decision reported in *In re Discontinuation of the State Bar of Wisconsin as an Integrated Bar*¹⁰⁸ involved a petition by a group of lawyers requesting the Wisconsin Supreme Court to make bar membership voluntary. The petition was filed in response to a vote of members of the Bar in which approximately sixty-percent of those voting favored a voluntary rather than an integrated bar.¹⁰⁹ After holding a public meeting on the issue, the supreme court denied the petition.¹¹⁰ In 1983, the supreme court appointed another committee to review the performance of the State Bar.¹¹¹ Continued integration was one of the subjects considered by the committee. After a public meeting on the issues, the supreme court decided to retain the integrated bar but ruled that the use of membership dues for funding legislative advocacy was improper.¹¹²

III. INTELLECTUAL INDIVIDUALISM VS. COMPULSORY ASSOCIATION

The first amendment¹¹³ has been the guardian of a multitude of individual freedoms, including the freedom of association.¹¹⁴ A corollary right, which has been sometimes characterized as a "negative right,"¹¹⁵ is the freedom to not associate with organizations or ideologies. Encompassed within this right have been claims by nonunion employees who were forced to be-

108. 93 Wis. 2d 385, 286 N.W.2d 601 (1980).

109. *Id.* at 386, 286 N.W.2d at 602.

110. *Id.* at 388, 286 N.W.2d at 603.

111. See Report of Committee to Review the State Bar, 112 Wis. 2d xix, 334 N.W.2d 544 (1983). The committee was known as the Kelly Committee, named after the committee chair, John Kelly, a Milwaukee banker.

112. See *id.* at xxv, 334 N.W.2d at 549. The State Bar was only prohibited from supporting political issues and candidates through its political action committee (LAWPAC). *Id.* It could still engage in legislative advocacy on issues germane to improving the administration of justice. However, in 1986, the supreme court developed a rebate procedure which permitted objectors to deduct their pro rata share of dues expended for such legislative activities at the beginning of each fiscal year. See SCR 10.03(5)(b) (1988); *In re* Amendment of State Bar Rules: SCR 10.03(5), 127 Wis. 2d xi (1986). Shortly thereafter, the board of governors adopted a by-law which provided for an arbitration proceeding in the event a disagreement arose between the bar and a member concerning allocation of expenditures to legislative activities. See Petition to Review State Bar By-Law Amendments, 139 Wis. 2d 686, 407 N.W.2d 923 (1987).

113. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble . . ." U.S. CONST. amend. I.

114. The right of freedom of association was first addressed in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

115. See Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. REV. 995, 996 (1982); *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478, 1489 (W.D. Wis. 1988), *rev'd sub nom.*, *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989).

come union members as a precondition of continued employment,¹¹⁶ or pay dues to support union activities with which they disagree;¹¹⁷ or the claims of students who were required to recite the pledge of allegiance when it was repugnant to their religious beliefs.¹¹⁸ Also within this category are a subset of cases in which lawyers have challenged both compelled membership in a bar association and use of membership dues for activities with which they did not agree.¹¹⁹ Together, all of these cases are commonly identified with a principle known as "intellectual individualism."¹²⁰ This principle embodies the "right of self-determination in matters that touch individual opinion and personal attitude."¹²¹ The extent to which the Court has been willing to extend first amendment protection in light of this principle is relevant to the integrated bar debate.

A. *Framing the Fundamental Importance of Freedom of Choice*

Several decisions of the Supreme Court have given credence to the principle of intellectual freedom in the face of government coercion. For exam-

116. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

117. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

118. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

119. See *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Hollar v. Virgin Islands*, 857 F.2d 163 (3rd Cir. 1988) (integrated bar does not violate first amendment when it expends funds to advance causes germane to the purposes for which it was integrated); *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986) (bar could only expend funds on matters germane to the bar's stated purposes); *Schneider v. Colegio de Abogados de Puerto Rico*, 682 F. Supp. 674 (D.P.R. 1988) (failure to protect dissenters' rights makes compelled membership in bar association unconstitutional); *Levine*, 679 F. Supp. at 1478 (mandatory bar membership is a constitutionally impermissible burden on an individual's rights of association and speech); *Kentucky Bar Ass'n v. Welke*, 766 S.W.2d 633 (Ky. 1989); *Falk v. State Bar of Michigan*, 631 F. Supp. 1515 (W.D. Mich. 1986), *aff'd*, 815 F.2d 77 (6th Cir. 1987); *Schneider v. Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963 (D.P.R. 1983), *vacated and remanded sub nom.*, *Romony v. Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984); *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982) (bar may use dues to support only functions which serve important government functions); *Keller v. State Bar of California*, 47 Cal. 3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542 (1989), *cert. granted*, 110 S. Ct. 46 (1989) (as a government agency, the bar can spend funds for any purpose within its authority); *Falk v. State Bar of Michigan*, 411 Mich. 63, 305 N.W.2d 201 (1981), *sub proceedings*, 418 Mich. 270, 342 N.W.2d 504 (1983), *cert. denied*, 469 U.S. 925 (1984); *Reynolds v. State Bar of Montana*, 660 P.2d 581 (Mont. 1983) (state bar may not use compulsory dues for lobbying unless it makes refunds to dissenters); *In re Chapman*, 128 N.H. 24, 509 A.2d 753 (1986) (bar must carefully tailor its position on legislative activities to limited issues within its constitutional mandate in order to protect its members' individual rights).

120. Justice Jackson is considered the originator of this principle. He believed that no society could benefit by efforts to compel unity and eliminate dissent. "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." See *Barnette*, 319 U.S. at 641-42.

121. *Id.* at 631.

ple, *West Virginia Board of Education v. Barnette*¹²² concerned a resolution adopted by the West Virginia Board of Education shortly after the beginning of World War II. This resolution required public schools to include a mandatory flag salute and the pledge of allegiance at the beginning of each school day in which all students and teachers were required to participate.¹²³ Any pupil who refused to participate was deemed guilty of insubordination and could be expelled. Additionally, the state would then be permitted to bring a delinquency action against the parents.¹²⁴ The plaintiffs were three Jehovah's Witnesses who were parents of several students. They argued that they could not be forced to violate their religious convictions by allowing their children to participate in the mandatory flag salute.¹²⁵ The Supreme Court ruled in favor of the plaintiffs, but the plurality opinion did not focus on the principles of religious liberty. Rather, Justice Jackson was concerned about the broader implications of government prescribed orthodoxy. He stated:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.¹²⁶

Of great importance to Justice Jackson was the extent to which government authority could compel speech in a democratic system which guarantees individual freedoms.¹²⁷ In light of the primacy of those democratic

122. 319 U.S. 624 (1943).

123. *Id.* at 626 n.2.

124. See Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 341 (1979).

125. *Barnette*, 319 U.S. at 629.

126. *Id.* at 642.

127. "There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." *Id.* at 641.

Whether Justice Jackson would totally prohibit compelled affirmation of a state-sponsored idea is not clear from the *Barnette* opinion. However, more recent commentary suggests that Justice Jackson adopted an absolutist's philosophy with respect to first amendment analysis. See Gard, *The Flag Salute Cases and the First Amendment*, 31 CLEV. ST. L. REV. 419, 422-24 (1982). Professor Tribe sees *Barnette* as a case in which the focus of concern is on preventing an invasion of the right of personhood. Freedom of expression is in part "an expression of the sort of society we wish to become and the sort of persons we wish to be . . ." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 576 (1978). Professor Emerson has similar notions. He stated that the ultimate justification for freedom of expression relates to the right of an individual as an individual to develop his own personality and realize his own potential free from government influence. T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 8-11 (1963).

freedoms, he determined that the compulsory flag salute statute violated the first amendment rights of the three plaintiffs.¹²⁸

In *American Communications Association v. Douds*,¹²⁹ the Court upheld the constitutionality of a section of the Taft-Hartley Act, which required that union officers file an affidavit stating that they were not communists and did not support the overthrow of the United States government.¹³⁰ Union officials who refused to comply with this law were denied numerous benefits which were available through the National Labor Relations Act. Unlike the compelled affirmative speech found in *Barnette*, this case involved compelled disclosure of political affiliations and beliefs. Although Justice Jackson agreed that disclosure of political affiliation was appropriate, he objected to the requirement that union officers sign the affidavit disavowing any belief which they may have had with respect to overthrowing the government.¹³¹ Justice Jackson reaffirmed his belief that the first amendment protects the "realm of opinion and ideas, beliefs and doubts, heresy and orthodoxy, political, religious or scientific."¹³² Essentially, *Douds* and *Barnette* concerned themselves with high-sounding democratic values; freedom from government-compelled ideas as a necessary precondition for avoiding forced conformity and protection of the individual's interest in "selfhood."¹³³

Subsequently, the Supreme Court expanded the reach of those first amendment values in *Wooley v. Maynard*.¹³⁴ In *Wooley*, the Court found that the plaintiff, a Jehovah's Witness, could not be compelled to display New Hampshire's state motto "Live Free or Die" on his license plates.¹³⁵ Unlike the flag salute in *Barnette* and the affidavit in *Douds*, the coerced behavior in *Wooley* was incidental since the plaintiff's involvement with the state motto was something less than coerced speech, and because the association between the plaintiff and the motto was not one that would make the world believe that they were advocates of the motto.¹³⁶ Nevertheless, the

128. *Barnette*, 319 U.S. at 642.

129. 339 U.S. 382 (1950).

130. *Id.* at 411-12.

131. *Douds*, 339 U.S. at 435-36, 442 (Jackson, J., concurring in part and dissenting in part).

132. *Id.* at 443.

133. See *TRIBE*, *supra* note 127, § 15-1, at 889.

134. 430 U.S. 705 (1977).

135. The plaintiff in *Wooley* covered the objectionable message with tape but subsequently was convicted of a misdemeanor for "knowingly [obscuring] . . . the figures or letters on any number plate." *Id.* at 707 (quoting N.H. REV. STAT. ANN. § 262:27-c (Supp. 1975)).

136. *Tribe* suggests that the Court's decision may have aggravated this problem. When the New Hampshire law was in effect, no one who saw the motto seriously believed that a person displaying the message would die for his freedom. Yet, after the Court's decision, *Tribe* argues that everyone in New Hampshire was forced to take a public stance on the motto: If the person

Court determined that New Hampshire's actions constituted promotion of a state-sponsored ideology which was repugnant to the "sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."¹³⁷ As such, the Court found that the mandated display of the state motto intruded upon the plaintiff's first amendment rights.¹³⁸

While *Barnette* and *Douds* were primarily a response to the fear of state-driven orthodoxy undercutting the incentive to promote nonconforming ideas, *Wooley* was an "appeal . . . to the vindication of individual personality."¹³⁹ Together, these cases capsulize two distinct ways in which government-compelled expression may infringe upon the individual's interest in "selfhood." First, compelled expression may interfere with the individual's right to define his public persona.¹⁴⁰ In this respect, compelled affirmation exposes a person's true views to the world or creates a misrepresentation in the public forum of what the individual believes.¹⁴¹ Second, compelled expression can infringe upon the individual's freedom of conscience.¹⁴² Unlike the latter circumstance which concerns how an individual may present himself to the public, "the interest in freedom of conscience focuses on the individual's self-perception."¹⁴³

The infringement occurs when an individual views compliance with the compelled message as acquiescence or agreement with its principles. Hence, individuals who submit to compulsory affirmation are likely to feel humiliation and disgrace when they are incapable of disassociating them-

left the license plate unaltered, you were a freedom lover; if the person covered it up, he was a Jehovah's Witness. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-5, at 901 n.16 (1978).

137. *Wooley*, 430 U.S. at 715 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

138. *Id.* at 716-17. The state argued that the requirement of compelled participation facilitated the identification of passenger vehicles because the motto was said to aid police in determining if the vehicle was properly licensed. *Id.* at 716. Secondly, it promoted "appreciation of history, individualism and state pride." *Id.* at 717. The Court determined that these assertions were not sufficient to outweigh the infringement of the plaintiff's interests because vehicle license plates were already distinguishable and there were other ways to promote history and pride which would be less restrictive. *Id.*

139. Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 854 (1986). "Although the state's message did not create any pressure to conform, displaying that message made them feel like traitors to their belief system." *Id.* at 854-55.

140. See Gaebler, *supra* note 115, at 1004.

141. *Id.* at 1005.

142. *Id.* at 1004.

143. *Id.* at 1005.

selves from the state's message.¹⁴⁴ Although the Supreme Court has not specifically delineated the freedom of conscience in the face of compulsory affirmation, *Wooley* personifies the Court's willingness to protect individually held beliefs, even when the state does not directly interfere with the way the individual projects oneself to the public.

The incidental intrusiveness in *Wooley* can be likened to compulsory membership in state bars. Just as the mere existence of the state's message on the license plate did not create any pressure to conform, the mere payment of an annual membership fee has also been characterized as minimally intrusive.¹⁴⁵ But in order for the integrated bar to be a functioning body, it must be allowed the freedom to carry on its business and make decisions which relate to "furthering the administration of justice" or "serving the public interest." Into these broad categories fall numerous issues that are inherently political in nature and carry with them varying viewpoints, depending on the political disposition of individual lawyers. It is impractical to think that a state bar could accommodate the views of every lawyer when it engages in legislative advocacy. Hence, lawyers are compelled to be members of an association which can take positions that are adverse to the personal beliefs of some of its members.

To many, the constitutional burdens posed by this circumstance are almost trivial. As the connection between the message and the individual becomes more attenuated, it not only becomes less likely that others will attribute the views to a particular lawyer, but it is also less likely that the individual lawyer will view compulsory membership as acquiescence.¹⁴⁶ The inherent difficulty is to ascertain when a member no longer considers involuntary involvement as an affront on freedom of conscience. The resolution of this problem necessarily invokes a subjective determination of each and every individual's tolerance to compelled association. Since no court can say with absolute certainty whether one person or another would find certain activities objectionable, a judicial determination may not be possible. Realizing that the myriad of strong convictions of lawyers will never

144. *Id.* "[S]tate . . . compel[led] expression constitutes a direct and powerful affront to the individual as an individual because it requires a denial of the self and represents the ultimate submission of the individual — submission of mind." *Id.*

145. The Wisconsin Supreme Court noted in *Lathrop v. Donohue* that the unified bar does not:

compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. . . . He is free . . . to voice his views on any subject in any manner he wishes, even though such views be diametrically opposed to a position taken by the State Bar.

Lathrop v. Donohue, 230, 237, 102 N.W.2d 404, 408 (1960), *aff'd*, 367 U.S. 820 (1961).

146. See Gaebler, *supra* note 115, at 1013-14.

consistently be in harmony, the assumption is that a compulsory association will always pose a first amendment infringement on the individual's freedom of conscience. The only measure for justifying any infringement, therefore, becomes an analysis of the need for such compulsory affirmation in the face of the constitutional infringement. In *Wooley*, preservation of individual identity was deemed more important than the state-sponsored purposes for which the compulsory participation was required.¹⁴⁷ Whether equal deference will be accorded to the first amendment infringement in the integrated bar remains to be seen.

B. The Residual Effect of Compelled Association: Compelled Disclosure

Dissenters in a compulsory association are in a difficult position. Either they remain silent and risk having the association's speech be interpreted as their own, or they openly disavow it and thereby relinquish their right to silence. Such a problem was recognized by the Supreme Court in *Pruneyard Shopping Center v. Robins*.¹⁴⁸ In that case, the Court upheld a state court interpretation of the state constitution permitting high school students to solicit petitions declaring opposition to a United Nations resolution against Zionism on the premises of a privately owned shopping mall.¹⁴⁹ The owner objected to the state's mandate that he provide a forum for third-parties to express their views.¹⁵⁰ Although a majority of the Court agreed that there was no merit to this claim,¹⁵¹ a concurring opinion by Justice Powell suggested that a better first amendment challenge could have been brought by the mall owner if he argued that the state, by granting the right of access, would in effect compel the owner to speak out in opposition to the views being expressed on the property.¹⁵² Powell suggested that such compelled disclosure could arise even if no confusion existed as to the source of the message, if the property owner found the ideas expressed so objectionable that he, in good conscience, could not remain silent.¹⁵³

147. See *supra* notes 134-39 and accompanying text.

148. 447 U.S. 74 (1980).

149. *Id.* at 77-78, 88.

150. *Id.* at 85-88.

151. The Supreme Court determined that *Wooley* was distinguishable for three reasons. First, the government itself was not disseminating any particular message in the shopping center; rather, it was granting the public access so that they could display whatever messages they chose. *Id.* at 87. Second, the state law in *Wooley* forbade the Maynards from covering up the motto, while the mall owner could disavow any connection with the message by "simply posting signs." *Id.* Finally, unlike the Maynard's automobile, the shopping center was open to the public, thus making it unlikely that the student-disseminated message would be taken to represent the views of the owner. *Id.*

152. *Pruneyard*, 447 U.S. at 100 (Powell, J., concurring).

153. *Id.* at 99.

Justice Powell continued this theme in *Pacific Gas & Electric Co. v. Public Utilities Commission*,¹⁵⁴ a case in which the Court reviewed the constitutionality of a California Public Utilities Commission order directing the Pacific Gas & Electric Company to periodically insert political editorials which advanced the views of a group which objected to the utility rates.¹⁵⁵ The constitutional challenge was prompted by Pacific Gas' practice of distributing a newsletter along with monthly billings, the content of which was deemed political in nature. Pacific Gas appealed the Commission's decision to the Supreme Court claiming the order mandated dissemination of a political message with which it disagreed. In a plurality opinion, the Court reversed the Commission's order.¹⁵⁶ Justice Powell's opinion emphasized that the right not to speak served the same societal purposes as the right to speak since both assure that public debate on public issues would be vigorous.¹⁵⁷ Declaring open access on the billing statement as punishment for expressing certain views would tend to inhibit expression since the speaker would opt for silence rather than accept the penalty.¹⁵⁸

The Court's concern about a person's protected right of silence poses difficulties for integrated bars. Although proponents of bar integration argue "that one of the advantages of an integrated bar is that it represents a diversity of viewpoints,"¹⁵⁹ representation in a voluntary bar association could be viewed similarly. Freedom to express views on policy matters is present in both organizations. But in addition to expression of viewpoints, members of voluntary associations have the option to remain silent, knowing that if they disagree with a bar decision, they can disavow the decision by quitting. This avenue is foreclosed to lawyers in integrated bars. Consequently, if an attorney feels strongly about an issue, the only personal satisfaction that he can hope to gain is by disclosing his true views, though he may be reluctant to do so. This result seems contrary to Powell's opinions in *Pacific Gas & Electric* and *Pruneyard* and may also be in contravention to the Court's holding in *Wooley* and *Barnette* which emphasized the vindication of personal beliefs from coerced expression.¹⁶⁰

154. 475 U.S. 1, *reh'g denied*, 475 U.S. 1133 (1986).

155. *Id.* at 4.

156. *Id.* at 20-21.

157. *Id.* at 8-9.

158. *Id.* at 10-11.

159. *See Levine*, 679 F. Supp. at 1496.

160. *See supra* notes 122-47 and accompanying text.

C. "Fee Speech"

Attorneys have attacked the constitutional propriety of the integrated bar on two first amendment grounds: freedom of association and freedom of speech. Although these vestiges of the first amendment are interrelated, the freedom of association argument has typically been utilized to attack the very idea of compulsory membership, while the freedom of speech argument has commonly been used to challenge specific bar activities, particularly legislative lobbying. Numerous lawsuits have been brought, both inside and outside the context of the integrated bar, which have challenged the use of compulsory membership dues for activities which individual members may oppose.¹⁶¹ Unfortunately, the response of the courts has generally been insufficient to resolve all the problems connected with expenditures of compulsory fees. Although the Supreme Court had the opportunity to discuss this issue in *Lathrop*, it nevertheless declined to address the problem.¹⁶² Still, the compelled financial support issue has been addressed by the Court on several occasions in the labor union context.

1. Union Shops

The opinions in *Lathrop* continually reference an analogous relationship between an integrated bar and a union shop.¹⁶³ A typical "union shop" requires that workers in a particular field become members of a union and

161. The payment of compulsory membership dues has been likened to the payment of taxes by citizens, or to mandatory student fees paid by most college students. For the most part, the tax argument has been rejected by the courts because the dues are spent for the benefit of only a segment of the population. See *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring); *Levine*, 679 F. Supp. at 1498. But see Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 22-25 (1983) (Compulsory membership groups are nearly identical to government entities, thus dues expenditures are similar to taxes.). Not much litigation has addressed the comparison between student fees and mandatory bar fees, although they are similar in some respects and different in other ways. Neither type of fee requires the payor to participate in any activity, and the chance of any message being identified with the payor is small. However, there are major differences. First, students are not required to be members of any association and there is no penalty as such for not joining, which is unlike the integrated bar, where the penalty is being barred from practicing law. Second, in many cases, most student fees are not used to support politically-related activities. Moreover, a student denied admission for failure to pay has less of a burden than a lawyer who must move to another state and pass a bar exam before he is allowed to practice law. For an informative discussion on student fees, see generally Wells, *Mandatory Student Fees: First Amendment Concerns and University Discretion*, 55 U. CHI. L. REV. 363 (1988); Comment, "Fee Speech:" *First Amendment Limitations on Student Fee Expenditures*, 20 CAL. W.L. REV. 279, 292-95 (1984).

162. Writing for the plurality, Justice Brennan refused to "intimate [any] view as to the correctness of the conclusion of the Wisconsin Supreme Court that the appellant may constitutionally be compelled to contribute . . . to political activities which he opposes." *Lathrop*, 367 U.S. at 847-48.

163. *Id.* at 842, 871, 879.

financially support its causes, including political and legislative activities, as a prerequisite for continued employment in that particular field.¹⁶⁴ Further, compulsory union membership is authorized by the state through statutory provision.¹⁶⁵

The analogous relationship between the integrated bar and the union shop was first recognized by Justice Douglas in *Railway Employees' Department v. Hanson*.¹⁶⁶ In *Hanson*, the Court upheld the validity of the union shop provisions of the Railway Labor Act¹⁶⁷ against charges that the union shop agreement forced workers into political associations which violated their freedom of association. Emphasizing that the only condition to union membership authorized by the statute was the payment of "periodic dues, initiation fees, and assessments,"¹⁶⁸ and that the only support required of members was financial support related to the work of the union in the realm of collective bargaining, the Court held that the union shop agreement was no more of an infringement or impairment of first amendment rights than a state law which required all lawyers to be members of an integrated bar.¹⁶⁹

Hanson has been criticized on a number of grounds, not the least of which was the Court's failure to give sufficient weight to the first amendment concerns raised in the case.¹⁷⁰ Additionally, *Hanson* left unanswered questions concerning the use of compulsory membership dues to support activities other than collective bargaining.¹⁷¹

The Court was confronted with the latter issue again in *International Association of Machinists v. Street*.¹⁷² In *Street*, labor unions, which had negotiated union shop agreements pursuant to the union shop authorization

164. Comment, *The Compelled Contribution in the Integrated Bar and the All Union Shop*, 1962 WIS. L. REV. 138, 148.

165. *Id.*

166. 351 U.S. 225 (1956).

167. Railway Labor Act, ch. 347, 44 Stat. 477 (1926) (current version at 45 U.S.C. § 152 (1976)).

168. *Hanson*, 351 U.S. at 229.

169. *Id.* at 238. Writing for a unanimous court, Justice Douglas noted: "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." *Id.* However, in *Lathrop*, Justice Douglas retracted his statement, noting that "on reflection the analogy fails." *Lathrop v. Donohue*, 367 U.S. 820, 879 (Douglas, J., dissenting).

170. Bond, *The National Labor Relations Act and the Forgotten First Amendment*, 28 S.C.L. REV. 421, 436 (1977); see also Comment, *First Amendment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-Examined*, 22 ARIZ. L. REV. 939, 958-59 (1980) (*Hanson* misapplied by the Supreme Court in *Lathrop*).

171. *Hanson*, 351 U.S. at 238.

172. 367 U.S. 740 (1961).

in the Railway Labor Act,¹⁷³ expended union funds in support of political activities to which the plaintiffs were opposed. The Court said that the use of exacted funds, over an employee's objection, to support political causes, was a use falling outside the reasons advanced by the unions and Congress for creating union shop agreements.¹⁷⁴ However, the Court avoided the issue pertaining to the constitutionality of using compulsory dues to support political activities with which an employee disagrees.¹⁷⁵ It also specifically declined to make a constitutional determination concerning the allocation of membership dues for purposes unrelated to collective bargaining and political activities.¹⁷⁶ Interestingly, the very same issues were before the Court in *Lathrop*, which was decided the same day as *Street*, and the Court still declined to articulate any position on those issues.¹⁷⁷

2. Agency Shops

Uncertainty remained in the area of freedom of speech until the Court decided *Abood v. Detroit Board of Education*.¹⁷⁸ The appellants in *Abood* were public school teachers who challenged the constitutionality of a Michigan law¹⁷⁹ which authorized a union and a government employer to agree to an agency shop.¹⁸⁰ Under the agreement, a nonunion teacher would be required, as a precondition for employment, to contribute a fee equivalent to union dues to the union.¹⁸¹ Initially, the Court addressed the coextensive relationship between free speech and making financial contributions to support chosen views. In *Buckley v. Valeo*,¹⁸² the Court held that financial

173. Railway Labor Act, ch. 347, 44 Stat. 477 (1926) (current version at 45 U.S.C. § 152 (1976)).

174. *Street*, 367 U.S. at 768.

175. The Supreme Court relied on the doctrine that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* at 749 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

176. *Id.* at 769-70.

177. See generally Comment, *Freedom from Political Association: The Street and Lathrop Decisions*, 56 NW. U.L. REV. 777 (1962); Note, *Impact of Lathrop v. Donohue and Int'l Ass'n of Machinists v. Street Upon the Expenditures of Associations*, 10 UCLA L. REV. 390 (1963).

178. 431 U.S. 209 (1977).

179. MICH. COMP. LAWS § 423.210 (1970).

180. Agency shop requires the payment of a fixed monthly fee to the union as a condition of employment regardless of whether the payer is a member of the union in order to reimburse the union for costs of representation. This is different from a union shop, which requires the employees to join the union as a condition of employment. See Mitchell, *Public Sector Union Security: The Impact of Abood*, 29 LAB. L.J. 697 (1978).

181. *Abood*, 431 U.S. at 211.

182. 424 U.S. 1 (1976) (per curiam).

contributions to political campaigns were a form of speech which merited first amendment protection.¹⁸³ Consequently, the *Abood* Court determined that requiring a contribution used to promote an idea opposed by the contributor constituted compelled support for an idea.¹⁸⁴ Invoking the teachings of *Barnette*, the Court concluded that the right of non-association¹⁸⁵ would protect employees from being required to financially support an ideological cause they may oppose as a condition of public employment.¹⁸⁶ Funds could only be allocated to activities germane to collective bargaining.¹⁸⁷

Lawyers have since argued that the mandatory dues issue in *Abood* was conceptually identical to the issue reserved in *Lathrop*, and therefore, "*Abood* is substantially determinative on the question of the constitutionality of an attorney's use of compulsory dues for causes to which the attorney objects."¹⁸⁸ Moreover, at least one commentator has suggested that *Abood* may spell doom for compulsory bar membership itself.¹⁸⁹

IV. THE NEW "FRONTAL ATTACK"¹⁹⁰ ON THE BAR: *LEVINE V. SUPREME COURT OF WISCONSIN*

A. *Opinion of the District Court*

The decision rendered in *Levine v. Supreme Court of Wisconsin*¹⁹¹ is significant in several respects. In the entire sixty-seven year history of the integrated bar, this was the first time a state reverted to voluntary bar sta-

183. *Id.* at 21-23.

184. *Abood*, 431 U.S. at 234-35.

185. This was the first time the Court clearly established that freedom of association entailed the right not to be associated through financial support with a private group's promotion of beliefs. See Schneyer, *supra* note 20, at 57.

186. *Abood*, 431 U.S. at 235.

187. *Id.* at 236.

188. See Sorenson, *supra* note 16, at 54.

189. Professor Schneyer has stated:

To be sure, *Lathrop* explicitly upheld compulsory bar membership. But it may have done so only because the Wisconsin State Bar had not been shown to engage in any activity for which compulsory dues could not be used. If lawyers cannot be forced to "associate" themselves with bar lobbying positions by providing financial support . . . it will take no great constitutional leap to find that they also cannot be forced to "associate" with those positions through membership.

See Schneyer, *supra* note 20, at 67 (footnote omitted); see also Comment, *Arrow v. Dow: The Legacy of Lathrop — State Bars Under Attack*, 8 OKLA. CITY U.L. REV. 89, 110 (1983).

190. See Marcotte, *Mandatory Bars Shaken*, 74 A.B.A. J. 36 (Oct. 1988) (comments of Wisconsin State Bar President John Walsh).

191. 679 F. Supp. 1478 (W.D. Wis. 1988), *rev'd sub nom.*, *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989).

tus.¹⁹² More importantly, this was a prototype decision in integrated bar litigation. It recognized that more recent freedom of association cases may have implicated the mandatory bar as constitutionally suspect. Further, the case suggests that changes in the character of the Wisconsin Bar have made *Lathrop v. Donohue*¹⁹³ inapplicable.

In 1986, Steven Levine, a Wisconsin lawyer, filed suit in federal district court challenging the constitutionality of the integrated bar.¹⁹⁴ Levine argued that his first amendment rights of association and speech were violated by Wisconsin's mandatory bar membership requirement.¹⁹⁵ Alternatively, he argued that if mandatory bar membership was constitutional, the use of his membership dues to fund political and ideological activities was unconstitutional.¹⁹⁶

With respect to the first issue, the district court began by framing the importance of the first amendment infringements, reasoning that the essence of the right of individual choice involves "the decision not to do something as well as the decision to do something."¹⁹⁷ Consistent with that reasoning, Judge Crabb ascertained that the first amendment could protect the plaintiff's right not to join the bar. However, Judge Crabb also noted that the right to associate and not to associate was not absolute; that government can and has infringed upon the protected rights of individuals.¹⁹⁸

Permissible infringements were justified by an analysis of the governmental interest in the regulation and the individual right to speech and association. This "balancing test" was first described in *Douds*,¹⁹⁹ but as the district court noted, when the Court reweighed the conflicting interests, it did not attribute more weight to the individual right in issue as it had done previously in *Barnette*.²⁰⁰ However, Judge Crabb determined that in recent cases the Supreme Court has been more protective of first amendment rights by requiring that infringements on the right to associate be justified

192. Shortly after *Levine* was decided, another district court determined that the integrated bar was unconstitutional. See *Schneider v. Colegio de Abogados*, 682 F. Supp. 674 (D.P.R. 1988).

193. 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961).

194. Plaintiff brought the action in federal court, alleging jurisdiction under 42 U.S.C. § 1983 (1982). *Levine*, 679 F. Supp. at 1479.

195. *Id.*

196. *Id.* at 1479-80.

197. *Id.* at 1490.

198. *Id.*; see also *Goldman v. Weinberger*, 457 U.S. 503 (1986); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

199. *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

200. *Levine*, 679 F. Supp. at 1491 (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

by regulations which serve a compelling state interest.²⁰¹ Further, the infringement must be the least restrictive means available to achieve the compelling state interest.²⁰²

Nonetheless, it is unnecessary for the test to be applied if the first amendment infringement is *de minimus*.²⁰³ The district court noted that mandatory membership in the State Bar of Wisconsin only consisted of the payment of dues and that the Supreme Court in *Lathrop* did not consider such payments to be a significant infringement on Lathrop's right not to associate.²⁰⁴ However, Judge Crabb read more recent decisions of the Court as suggesting that mere payment of dues was a significant infringement on the first amendment. For example, Judge Crabb cited *Wooley*²⁰⁵ and *Pacific Gas & Electric*²⁰⁶ as indications that the Court had not restricted the definition of compelled association to the identification of an individual with views he does not share; the focus was on the idea of compulsion itself.²⁰⁷ Additionally, Judge Crabb raised the issue of compelled disclosure, citing to Justice Powell's opinions in *Pruneyard* and *Pacific Gas & Electric*.²⁰⁸

As for the mandatory payment of dues, the district court once again looked to modern case law to refute the Supreme Court's conclusion in *Lathrop* that mandatory payment of dues was similar to the payment of taxes and, therefore, the infringement occasioned by compulsory payments was insignificant.²⁰⁹ Critical to the district court's analysis was *Buckley v. Valeo*.²¹⁰ In *Buckley*, the Supreme Court held that financial contributions to political campaigns constituted protected speech and that mandated limitations on political contributions were unconstitutional. The Court found that the legislative limitations on financial contributions imposed restrictions on "political communication and association."²¹¹ Judge Crabb found *Buckley* to extend beyond the realm of political speech and concluded that compelled payment of contributions likewise infringed on the freedoms of association and speech.²¹² Further support for this view was found in

201. *Id.*

202. *Id.*

203. *Id.* at 1494 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)).

204. *Id.*

205. *Wooley v. Maynard*, 430 U.S. 705 (1977).

206. *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986).

207. *Levine*, 679 F. Supp. at 1495.

208. *Id.* at 1495-96.

209. *Id.* at 1496.

210. 424 U.S. 1 (1976).

211. *Id.* at 18.

212. *Levine*, 679 F. Supp. at 1496-97.

Abood,²¹³ where Judge Crabb found key language of the Supreme Court opinion as suggesting that the Court had abandoned the *Lathrop* rationale that the payment of dues was an insignificant first amendment infringement.²¹⁴

In addition to the first amendment considerations, the plaintiff in *Levine* also contended that *Lathrop* was no longer determinative because the facts upon which the Supreme Court based its decision had changed.²¹⁵ The district court, in addressing this argument, perceived that the majority of the *Lathrop* Court was influenced primarily by the Bar's quasi-public involvement in "elevating the educational and ethical standards of the Bar."²¹⁶ Noting the Bar's diminished role in those areas, Judge Crabb concluded that *Lathrop* was factually distinguishable and therefore not determinative on the issues presented.²¹⁷

Since *Lathrop* was no longer dispositive, the district court applied a compelling state interest analysis and determined that the Bar activities which were supported by mandatory dues did not constitute a compelling state interest.²¹⁸ Further, the State Bar did not show that compulsory membership was the least restrictive means of achieving its goals.²¹⁹ For these reasons, compulsory bar membership was rendered unconstitutional.²²⁰

B. Seventh Circuit Reversal

The principal issue on appeal was whether *Lathrop* controlled the outcome of the *Levine* decision.²²¹ In a rather cursory opinion, the United States Court of Appeals for the Seventh Circuit reversed the judgment of the district court.²²² Writing for a unanimous court, Judge Flaum ad-

213. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

214. To be required to help finance the union as a collective-bargaining agent *might well be thought*, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, *or to refrain from doing so, as he sees fit*. But the judgment in *Hanson and Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

Levine, 679 F. Supp. at 1497 (quoting *Abood*, 431 U.S. 209, 222 (1977) (emphasis in text)).

215. *Id.* at 1491.

216. *Id.* at 1492.

217. *Id.* at 1493.

218. *Levine*, 679 F. Supp. at 1501.

219. *Id.* at 1501-02.

220. *Id.* at 1502.

221. *Levine v. Heffernan*, 864 F.2d 457, 459 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989).

222. *Id.* at 463.

dressed what he perceived to be two alternative premises advanced by the district court. The first premise was that "*Lathrop* has been implicitly overruled by subsequent Supreme Court decisions."²²³ Initially, the court noted that for *Lathrop* to have been implicitly overruled, it must be satisfied that "this is one of those rare cases where circumstances 'have created a near certainty that only the occasion is needed for the pronouncement [by the Supreme Court] of the doom' of an obsolete doctrine."²²⁴ The court of appeals could find no circumstances which satisfied this criteria.²²⁵ Further, the court of appeals believed that the cases cited by the district court did not cast any doubt on the validity of *Lathrop*.

Judge Flaum focused primarily on the cases which involved the compelled financial support prong of the first amendment infringement. Specifically, he believed that Judge Crabb's interpretation of *Buckley* was too broad, asserting that the compelling state interest test was applicable only when "core first amendment activity is involved."²²⁶ Compelled financial support of the Bar was apparently not considered core first amendment activity. The court of appeals also distinguished *Abood* and *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,²²⁷ concluding that the compulsory contribution requirements were significant first amendment infringements and were *dicta*.²²⁸ Judge Flaum restricted the compelling state interest analysis in *Abood* and *Ellis* to cases which involved the funding of certain activities with compulsory dues payment and not the very fact of compelled membership itself, which he believed was resolved in *Lathrop*.²²⁹

Concluding that *Lathrop* was still good law, the court of appeals next sought to determine whether the holding of that case was applicable to the facts of *Levine*. Judge Flaum asserted that "[i]f Wisconsin's present integrated bar is substantially similar to its predecessor, *Lathrop* compels us to conclude that it serves a legitimate state interest."²³⁰ The court of appeals

223. *Id.* at 460.

224. *Id.* at 461 (quoting *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986)).

225. In his analysis, Judge Flaum found that no Supreme Court justice had questioned the validity of *Lathrop* and that lower courts had followed the *Lathrop* precedent. *Id.* at 461 (citing *Hollar v. Government of the Virgin Islands*, 857 F.2d 163 (3rd Cir. 1988); *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir. 1986)). Finally, because *Lathrop* was the only precedent in the integrated bar area, the district court had to analogize the bar to a union shop in order to reach its conclusion. This policy of employing an analogy to overrule a higher court precedent would undermine the doctrine of *stare decisis*. *Levine*, 864 F.2d at 461.

226. *Id.* at 462.

227. 466 U.S. 435 (1984).

228. *Levine*, 864 F.2d at 462.

229. *Id.*

230. *Id.*

noted the diminished role of the State Bar of Wisconsin in attorney discipline and continuing legal education but concluded that the Supreme Court in *Lathrop* placed no special emphasis on those activities.²³¹ Consequently, the court of appeals recognized that the district court overemphasized the Bar's role in ethics and education. Finding the State Bar indistinguishable from the one presented to the Court in *Lathrop*, the court of appeals reversed the district court decision.²³²

C. Questions Unanswered

Although the decision of the court of appeals was intended to correct what it felt was an aberration in the law, its summary opinion was defective in several respects. First, although the court of appeals ascertained that *Lathrop* was still good law, it conceded Judge Crabb's argument that in order for *Lathrop* to apply, the current Wisconsin bar must be "substantially similar to its . . . predecessor."²³³ The only two activities which the court of appeals addressed in its comparison of the two bars was their mutual involvement in continuing legal education and ethics. Perhaps this approach was justified since those were the only two bar activities which the district court gave notable mention to in its analysis.²³⁴ However, other modifications to the Wisconsin State Bar were neglected, which, if applied in a comparative analysis, could realistically distinguish the modern State Bar from the State Bar in the *Lathrop* decision.²³⁵ Nevertheless, the failure

231. *Id.*

232. *Levine*, 864 F.2d at 463.

233. *Id.* at 462.

234. *See Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478, 1492-93 (1988).

235. The court of appeals did recognize, albeit in a footnote, that the Supreme Court in *Lathrop* noted the multifaceted character of the Wisconsin State Bar. *See Levine v. Heffernan*, 864 F.2d at 462 n.11. However, as Professor Schneyer has suggested, a majority of the Court viewed the state bar as a public agency created to fund and administer regulatory programs. *See Schneyer, supra* note 20, at 54-55. Most certainly then, the Bar's involvement in discipline and education were influential factors in the Court's decision. In support of this argument, the Court did consider noteworthy the Bar's "major role in the State's procedures for the discipline of members of the bar for unethical conduct." *Lathrop*, 367 U.S. at 830. The Court also found that "[t]he most extensive activities of the State Bar are those directed toward post-graduate education of lawyers." *Id.* at 839 (quoting *Lathrop*, 10 Wis. 2d 230, 246, 102 N.W.2d 404 412 (1960)). However, the Bar's diminished role in discipline and education are not the only noteworthy changes.

First, in the area of unauthorized practice of law, the committee by-law pertaining to that subject stated in part: "The committee shall seek the elimination of such unauthorized practice and participation therein on the part of members of the bar, by such action and methods as may be appropriate for that purpose." *Lathrop*, 367 U.S. at 831 n.7. Currently, the unauthorized practice of law is a statutory violation, which can only be enforced by the state Attorney General or a district attorney. *See WIS. STAT. § 757.30* (1987-88). The State Bar has petitioned the Wis-

of the court of appeals to make a clear determination on the factual applicability of *Lathrop* to the modern Bar casts doubt on the utility of that decision. Further, the court of appeals itself may not be sure where *Lathrop* stands. At one point in the opinion it stated that "since *Lathrop* was decided, the character of the Wisconsin Bar has changed considerably."²³⁶ The disposition of the case, however, suggests a contrary view.

Second, the court of appeals did not make a complete response to the first amendment arguments raised by the district court. Particularly, it neglected to comment on the district court's comparison of *Wooley*, a freedom of nonassociation case where the degree of state infringement was low, to the minimal infringement posed by compulsory bar membership. Additionally, it made no attempt to reconcile the district court's application of the compelled disclosure argument raised in *Pruneyard* and *Pacific Gas & Electric*.

The court of appeals' narrow construction of the holding in *Abood* is also problematic. Judge Flaum asserted that *Abood* only applied to the use of mandatory dues for certain activities and not to the issue of compulsory membership, which he noted had already been put to rest in *Hanson*.²³⁷

consin Supreme Court twice during the 1980s to designate the Bar as an official decision maker concerning unauthorized practice but the court denied both petitions.

Second, although the State Bar has maintained a standing committee on legislation, the procedures with regard to position-taking have changed since *Lathrop*. See *supra* text accompanying notes 75-81.

Third, the State Bar continues to maintain a committee on professional ethics. According to the *Lathrop* bylaw, however, the committee was required to "formulate and recommend standards and methods for the effective enforcement of high standards of ethics and conduct in the practice of law." *Lathrop*, 367 U.S. at 829-30 n.7. The committees' influence on ethics in Wisconsin legal practice has been insubstantial. The committee has not promulgated any standards currently in use in the state. The Wisconsin Supreme Court has deferred to the ABA model standards in ethics. Further, although the committee publishes ethics opinions in the *Wisconsin Lawyer*, those opinions are not binding on any lawyer.

Fourth, at the time of *Lathrop*, a standing committee existed which pertained to judicial selection. Subsequently, this was merged with the committee on administration of justice. Although the stated purposes have remained essentially the same, the Bar has significantly curtailed its involvement in the judicial selection process. See *supra* text accompanying notes 91-93.

The Bar does have several other responsibilities not recognized in *Lathrop*. Supreme Court Rule 12.01 creates a Client Security Fund to reimburse losses to the public caused by dishonest lawyers. The fund is currently managed by the State Bar, but is funded by an assessment on lawyers separate from bar dues.

Lawyers are also required to place client's funds in trust accounts pursuant to SCR 11.05 (repealed June 10, 1987, effective Jan. 1, 1988). Information concerning those accounts must be reported to the State Bar on the lawyer's annual dues statement. The State Bar, in turn, provides that information upon request when the BAPR receives a complaint against a lawyer. Essentially, the Bar's function here is ministerial.

236. *Levine*, 864 F.2d at 458.

237. *Id.* at 462.

The reasoning is anomalous because the compelling government interest involved in *Hanson* and *Abood*, preserving industrial peace, is only applicable to union shops and not to bar associations. If the purposes themselves are dissimilar, then perhaps it is the compelling government interest that they share. Assuming the accuracy of that statement, does the Court's application of the union shop analogy to the bar necessarily mandate the existence of some compelling interest?²³⁸ This seems consistent with the Court's holding in *Lathrop*, since at that time the Wisconsin State Bar was vested with greater regulatory power over the bar than it currently possesses. Unfortunately, the Court has not assessed the governmental interest in the integrated bar since that time.

V. LAW, POLITICS, AND THE VIABILITY OF THE MANDATORY BAR

Whether compulsory membership in the bar is proper ultimately depends on individual perceptions of the bar itself. To the lawyer that perceives the bar as being charged with the maintenance and betterment of justice, integration would be a benefit. Activities and proposals advanced by the bar are seen as neutral in character, addressing strictly technical legal issues which transcend the political arena. To the lawyer who views bar activities as very political, compulsory association is deemed offensive.

However, the integrated bar does not require the "politics" lawyer to associate with views with which he does not agree. He is only expected to pay membership dues. This is constitutionally permissible in light of the purposes for which the integrated bar was established. Nevertheless, these purposes may be too amorphous to justify compulsory membership because many activities which are political can fall under a general descriptive phrase such as "to further the administration of justice."²³⁹ Succinctly stated, "[t]he unified bar's problem lies in its inherently confused legal and

238. Judge Crabb determined that the Supreme Court, by its holdings in the union shop context, has implied that unified bars must be justified by a compelling state interest. See *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. at 1500.

239. Justices on the Supreme Court recognized this problem at oral argument in *Lathrop*. At one point, oral argument focused on a denial by Mr. Gordon Synkin, counsel for the State Bar, that the integrated bar was like a political party:

CHIEF JUSTICE WARREN: . . . Take the number of judges a county should have. That is a rather political thing. . . . Also, the question of how much judges should be paid is more or less a political thing. . . .

MR. SINYKIN: I do not think they are political activities. . . .

MR. JUSTICE BLACK: But they are activities in connection with the passage of legislation on which people differ, on which they frequently have differences. . . .

MR. JUSTICE FRANKFURTER: Suppose somebody were to make a proposal . . . before the bar . . . to change your constitution so as to give to the state judges . . . life tenure. . . . Can you think of a more politically charged question than that?

political status, which has trapped the institution in an increasingly destructive cross-fire [sic] of values."²⁴⁰ This condition has disabled the integrated bar's effectiveness and versatility.²⁴¹

Reverting to voluntary bar status is a feasible alternative for several reasons. First, there are no legal or political identity problems. The voluntary bar is a private organization, not a public agency or a compulsory membership group. Second, voluntary bar membership would be consensual, thus eliminating internal disruption by dissident lawyers. In turn, this would give the bar flexibility in both revenue gathering and in legislative advocacy. More importantly, without a legislature or court constantly looking over its shoulder, the voluntary bar would essentially be an autonomous association.

The State Bar of Wisconsin will lose very little by remaining voluntary.²⁴² Regulation of attorney discipline and competence is already the responsibility of independent agencies. Moreover, those agencies and the CLE program are already funded by separate assessments on lawyers.

After some further argument on what is a political matter, Justice Frankfurter summed up his position by saying:

You cannot rest this case on a nice line between what is political and what is not political insofar as the bar as a corporate body in your state may express its views. I do not think you can rest or sustain your Supreme Court by giving a very circumscribed and . . . mutilated notion of something as political and something that is not political. These things are inextricably bound together.

See D. MCKEAN, *supra* note 1, at 102-03.

240. See Schneyer, *Sunset for the Unified Bar?*, 12 B. LEADER 20, 22 (Sept.-Oct. 1986).

241. According to Professor Schneyer, problems for the integrated bar are created from external and internal forces. The internal problem is "the obstruction of bar operations by dissident members." *Id.* at 21. The external symptom relates to the involvement of courts and legislatures in the governance and operations of the bar. *Id.* In Wisconsin, for example, the supreme court has the authority to appoint a committee to review the state bar's performance in carrying out its functions. See SCR 10.10 (1988). Anytime the court appoints a committee to review Bar activities, the cost for the investigation is borne by the State Bar. For example, the Kelly Committee's work in 1982 cost the State Bar approximately \$50,000 in direct expenses and approximately another \$50,000 in voluntary time put in by bar leaders. See Schneyer, *supra* note 20, at 92-93. Schneyer also suggests that the integrated bar is at a disadvantage in legislative advocacy as compared to other associations. For example, in 1986 a medical malpractice reform compromise was reached between Wisconsin's state medical society and the Wisconsin Academy of Trial Lawyers. The State Bar did not become involved. See Schneyer, *supra* note 240, at 22. For a discussion of related problems inherent in the unified bar, see *supra*, notes 24-27 and accompanying text. But see Ross, *The Sun Still Shines on the Unified Bar*, 12 B. LEADER 18 (Sept.-Oct. 1986) (unified bar is an effective organization to examine public institutions and processes as well as to insure equal access to justice).

242. Although the Seventh Circuit Court of Appeals has ruled that mandatory membership in the bar is constitutional, the State Bar of Wisconsin continues to operate as a voluntary bar association.

However, certain record keeping programs that would remain under State Bar control should receive funding from additional lawyer assessments.²⁴³

In membership and finance, statistics indicate that voluntary state bars have learned how to retain a broad membership base and have demonstrated their ability to raise funds just as effectively as the integrated bars.²⁴⁴ Arguably, membership stability will also be maintained by virtue of the bar's role in providing a forum for CLE courses. Since the Wisconsin Supreme Court has mandated that each lawyer must receive thirty credit hours every two years, the impetus created by that requirement will help retain membership.²⁴⁵ Furthermore, the concern that voluntary status would significantly reduce bar revenue is misplaced. Currently, mandatory bar dues are only a fraction of the total revenue received by the State Bar.²⁴⁶ With the proposed additional assessments on lawyers to support bar administrative functions and the increase in dues which would accompany voluntary bar status, the State Bar will be able to maintain a majority of its programs.

VI. CONCLUSION

The mandatory bar was considered the most efficient organization to advance both public interests and the interests of the legal profession. But, as time passed, it became clear that integration did not produce a self-governing bar; however, it did produce a bar that was inherently flawed. Compulsory membership inevitably led to court imposed restrictions, disruption by unwilling participants and costly litigation.

Perception of the constitutional justification for integration has also evolved. Although at one time the mandatory bar was perhaps vested with enough regulatory power to warrant compulsory membership, the trend suggests a more diminished role. Whether this factor will significantly impact on a first amendment analysis of the bar is unclear. A consistent application of the first amendment to compulsory participation in the integrated bar has heretofore eluded the courts. This is the fault of both lawyers and

243. The state bar does perform certain administrative functions (such as collecting records on trust accounts for BAPR) which could be paid for by an assessment on all lawyers. Additionally, the supreme court could always step in and sanction additional assessments on lawyers for essential programs (i.e., the Lawyer Information Referral Service) if the voluntary bar lacks sufficient resources.

244. See *supra* note 28 and accompanying text.

245. This assertion is supported by the fact that nearly 90% of Wisconsin's lawyers renewed their membership in the voluntary bar. See *supra* note 22.

246. According to the 1988 State Bar Annual Report, membership dues were only 33% of the total state bar budget. See State Bar of Wisconsin, *1988 Annual Report*, 61 WIS. B. BULL. 33, 35 (Nov. 1988).

judges, who are perhaps more willing to vigorously enforce the rights of others than their own rights as private citizens.

This most recent round of litigation is an opportunity for the courts to recapture and imbue some consistency to the methodology applied to the constitutional infringements occasioned by compulsory association. Although the state might sanction a compulsory association, it has the burden of presenting exceptional circumstances which justify the infringement on individual liberty. Based on the current state of the integrated bar, the voluntary bar seems ideally suited for preserving individual freedom for its members and autonomous unrestricted control for itself.

PETER A. MARTIN*

* The author wishes to extend appreciation to Professor Michael K. McChrystal for his guidance in the preparation of this Comment.